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June 4, 1996

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CS Docket No. 96-85: Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996

Dear Mr. Caton:

Enclosed for filing with the Commission please find an original and eleven copies of the Comments of Time Warner Cable in the above-referenced proceeding.

If there are any questions regarding this matter, please communicate directly with the undersigned.

Very truly yours,

Arthur H. Harding

Arthur H. Harding
Counsel for Time Warner Cable

AHH:kma:40296

Enclosure

cc: ITS
Nancy Stevenson

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

JUN - 4 1996

In the Matter of	)	
	)	
Implementation of Cable	)	CS Docket No. 96-85
Act Reform Provisions of the	)	
Telecommunications Act of 1996	)	

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COMMENTS OF TIME WARNER CABLE

TIME WARNER CABLE

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Its Attorneys

Dated: June 4, 1996

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SUMMARY

Time Warner Cable respectfully urges the Commission, in its Order and Notice of Proposed Rulemaking ("Cable Reform NPRM") implementing the "cable reform" provisions of the Telecommunications Act of 1996 ("1996 Act"), to bear in mind the Congress' intent "to provide for a pro-competitive, de-regulatory national policy framework."

Thus, the 1996 Act's new "effective competition" test should employ the 1996 Act's new Title I definition of "affiliate." The Title I definition effectuates Congressional intent to recognize effective competition where telephone companies make significant investments in multichannel video programming distributors ("MVPDs"). Accordingly, both passive and active ownership interests in such MVPDs should be attributable. Beneficial interests such as options, warrants, convertible debentures and interests held in trust should properly be deemed the "equivalent" of equity for purposes of the new effective competition test. Such beneficial interests should be defined pursuant to Rule 13d-3 under the Securities Exchange Act of 1934.

In analyzing effective competition situations under the new test, the Commission should aggregate the interests of more than one LEC in a competing MVPD. This would be consistent with the Commission's current effective competition rules, and is even more necessary when dealing with deep-pocketed LECs who jointly invest in MVPDs. Similarly, LECs need not be owner/licensees of MVPD facilities to provide effective competition. In many cases, LECs may be the service providers using another's facilities. In such cases, the LEC clearly has the authority to control the facility providing effective competition, regardless of who is listed as the owner or licensee.

As with the Commission's current effective competition rules, competitors should be required to cooperate reasonably in providing ownership affiliation information requested by cable operators. In addition, the Commission may want to modify FCC Form 430 to require wireless cable licensees to certify whether they and their programmers are LEC-affiliated. This simple requirement would ease administrative burdens for all parties.

As Commissioners Quello and Chong have compellingly indicated, Congress expressly declined to include a percentage pass or penetration rate factor in the new effective competition test, and no such requirement can be read into the statute.

Consistent with current Commission policy, MMDS service should be deemed "offered" for effective competition purposes to those subscribers residing in the MMDS operator's 35-mile protected zone that defines its "interference-free contour." Additionally, the Commission and Congress have previously recognized that SMATV is very different from direct-to-home satellite service such as DBS or home satellite dish service. The Commission should again recognize this distinction, and not include SMATV as direct-to-home satellite service exempt from the effective competition test.

The 1996 Act requires the competitor's programming to be "comparable" to that provided by the cable system in order for effective competition to exist. The legislative history to the 1996 Act states that comparable programming must include "some" television broadcasting signals. The Conference Report then cites Section 76.905(g) of the Commission's rules, which defines "comparable" in terms of nonbroadcast signals. If the broadcast signal standard is adopted, it should include superstations. Furthermore, Congress appeared to intend that only one such channel be required. Inclusion of signals on the

competitor's channel lineup is the simplest and best evidence that the signals are being offered.

Where effective competition exists, Congress intended deregulation to take effect any time beginning February 8, 1996. Cable operators should be immediately freed from all rate regulation as of the date any of the effective competition tests are satisfied. This could be demonstrated by filing an effective competition petition with the Commission and serving it upon affected local franchising authorities ("LFAs"), subject to refunds and rollbacks if the petition is ultimately rejected. The Commission should deem an effective competition petition granted if either (1) all relevant certified LFAs concur, or (2) the petition is unopposed after close of the public notice period. If the petition is opposed, the Commission should rule on it within 90 days, or else it would be deemed granted.

When an LFA receives a CPST subscriber complaint, it should be required to supply a copy to the affected cable operator within 10 days. Thereafter, the cable operator should be allowed, if it chooses, to provide information to the LFA showing that a complaint to the FCC would be unwarranted. The LFA should be required to file a complaint with the Commission within 120 days of the effective date of the rate increase.

Time Warner agrees with the Commission's proposal to eliminate the requirement that cable operators include the address and phone number of the Cable Services Bureau on monthly bills, since subscribers may no longer file complaints directly with the Commission. Likewise, cable operators should not be required to list the LFA's name and address on subscriber bills unless requested to do so by LFAs.

Time Warner concurs with the Commission's actions allowing notice of rate and service changes to be provided by any reasonable written means, including newspaper ads or on-screen announcements. However, the Commission should eliminate the requirement that cable operators provide a minimum of thirty days advance written notice of any service or price change in those areas where the operator is subject to effective competition.

Small cable operators that subsequently grow or are acquired by large companies should not be subject to reregulation upon exceeding statutory thresholds. They should not be penalized for achieving the very success that Congress intended for them. If the Commission decides to reregulate small cable operators after acquisition by larger companies, the allowable small system rate in effect should be grandfathered.

The Commission should confirm that bulk discounts are often based on penetration within the MDU, rather than limited to a fixed discount for the entire MDU. Likewise, the Commission should allow non-uniform discounts to be offered to MDU residents who are billed individually for cable service. For purposes of allowing discounts, "MDU" should be defined consistent with the current expanded private cable exemption to the definition of a cable system. Time Warner also agrees with the Commission that allegations of predatory pricing should be made and reviewed under principles of federal antitrust law.

Time Warner proposes an administratively feasible threshold showing of predatory pricing, based on the average "cash flow margin" for the cable industry as set forth in the Commission's annual report to Congress on the status of competition in the video distribution business. A *prima facie* showing of predatory pricing might be found to exist in any case where a cable operator's MDU discount, compared to the retail residential rate, is greater

than the average industry cash flow margin as reported by the Commission. Because the industry cash flow margin is a reasonable surrogate for the amount that revenues exceed costs, any discount *less* than the industry average margin can reasonably be assumed not to be below cost. Where a *prima facie* showing is made, the Commission should rely upon discovery procedures as set forth in the Commission's cable program access complaint rules. However, competitively sensitive cost data should be submitted only to the Commission, not to competitors or the public. Sanctions should be imposed on the filing of frivolous complaints.

The Commission should implement all changes mandated by Congress in the area of technical standards, including elimination of day-to-day LFA oversight and enforcement of technical standards compliance as part of the franchise process. The Commission should also take immediate action to implement Congress' goal of promoting the development of advanced interactive broadband telecommunications networks and services, by creating incentives for new broadband entrants to deploy advanced networks, and for incumbent providers to upgrade their networks to provide such services.

Time Warner agrees with the Commission's definition of "nudity" for purposes of allowing cable operators to refuse to carry certain programming on public or leased access channels. The Commission should further clarify that the reasonable judgment by a cable operator to refuse to carry programming that it determines to be obscene or indecent is presumptively valid.

BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

In the Matter of	)	
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85

COMMENTS OF TIME WARNER CABLE

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., by its attorneys, hereby submits the following comments in response to the Order and Notice of Proposed Rulemaking released by the Commission in the above-captioned proceeding.[1/] Time Warner Cable operates cable television systems across the United States.

I. EFFECTIVE COMPETITION

Pursuant to Section 623(a)(2) of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"),

> [i]f the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section.[2/]

[1/] ___ FCC Rcd ___, FCC 96-154, released April 9, 1996 ("Cable Reform NPRM").

[2/] 47 U.S.C. § 543(a)(2) (emphasis added.)

The Telecommunications Act of 1996 adds a new test to this definition, whereby a cable system is considered to be subject to effective competition (and therefore exempt from rate regulation) where

> a local exchange carrier ["LEC"] or its affiliate (or any multichannel video programming distributor ["MVPD"] using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.[3/]

The Cable Reform NPRM amended the Commission's rules to incorporate the new statutory effective competition test,[4/] and adopted interim rules and procedures whereby a cable operator could seek a declaration that the new effective competition test is satisfied under particular circumstances.[5/] The Cable Reform NPRM seeks comment on numerous issues regarding implementation of the test.

A. Definition Of "Affiliation."

1. The Effective Competition Test Should Employ the New Statutory Definition of "Affiliate."

As the Commission notes, prior to adoption of the 1996 Act, Title VI of the Communications Act already contained the following definition of "affiliate":

> the term 'affiliate," when used in relation to any person, means another person who owns or controls, is owned or controlled

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[3/]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, approved February 8, 1996 ("1996 Act"), at Sec. 301(b)(3).

[4/]47 C.F.R. § 76.905(b)(4).

[5/]Cable Reform NPRM at ¶¶ 17-18.

> by, or is under common ownership or control with, such person.[6/]

However, as the Commission also notes, the 1996 Act incorporates a new definition of "affiliate" into the general definitions contained in Title I of the Communications Act:

> [t]he term 'affiliate' means a person that (directly or indirectly) owns or controls, is owned or controlled, or is under common ownership or control with another person For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent.[7/]

According to the Communications Act, the definitions contained in Title I apply "unless the context otherwise requires. . ."[8/]

The Commission asks whether, for purposes of the effective competition test, "the context requires" a different definition of "affiliate" than that established in Section 3(a)(2) of the 1996 Act. The Commission tentatively concludes that the new Title I definition should apply because use of the new definition "is not inconsistent with Congressional intent and would create some uniformity throughout the Commission's rules."[9/] Time Warner agrees that the Title I definition would effectuate Congressional intent to find effective competition to exist in any situation where a telephone company, due to its unique economic strengths and competitive advantages, has made a significant investment (more than 10%) in a competing multichannel video programming distributor. However, Time Warner submits that it is not necessary or appropriate to adopt a "uniform" affiliation test for each of the Commission's rules. Rather, Congress expressly included the phrase "unless the context

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[6/]Id. at ¶ 74, citing 47 U.S.C. § 522(2).

[7/]47 U.S.C. § 153(33).

[8/]Id. at § 153.

[9/]Cable Reform NPRM at ¶ 77.

otherwise requires" in recognition of the Commission's discretion to tailor differing affiliation tests to comport with the policy goals in the context of each applicable FCC rule.[10/] Indeed, the Commission routinely has exercised its discretion to adopt differing affiliation tests to comport with the policies underlying various FCC rules.[11/]

Assuming that the statute's new definition of "affiliate" should apply in the context of the new effective competition test, Time Warner agrees with the Commission's tentative conclusion that "both passive and active ownership interests" should be attributable,[12/] and that beneficial interests should be deemed "equivalent" to an equity interest for the purposes of the statutory test.[13/] Non-voting stock and insulated limited partnership interests are "passive" ownership interests that should be included as "equity or its equivalent" because such interests reflect circumstances where a LEC has made a significant financial investment in a competing MVPD. Similarly, beneficial interests such as options, warrants, convertible debentures and interests held in trust should properly be deemed the "equivalent" of equity because inclusion of such interests is consistent with the purposes of the new effective competition test.

According to the legislative history of Section 652, "the conferees agreed, in general, to take the most restrictive provisions of both the Senate bill and the House amendment in order to maximize competition between local exchange carriers and cable operators within

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[10/]As the Commission has noted, "various attribution rules have been used by the Commission and by other regulatory agencies depending on the specific policy or rule in question . . . ." First Report and Order, MM Docket No. 92-265, 8 FCC Rcd at 3770 (1993).

[11/]See, e.g., 47 C.F.R. § 76.501(notes); 76.934(a); 76.1000(b).

[12/]Cable Reform NPRM at ¶ 15.

[13/]Id. at ¶ 77.

local markets."[14] Moreover, in adding the new effective competition test to the 1996 Act, Congress recognized that "[o]nce consumers have a choice among cable offerors, the need for regulation diminishes."[15] Thus, the Commission's proposed reading of the new effective competition definition would maximize the ability of cable operators, who would be subject to rate regulation absent inclusion of passive and beneficial ownership interests as "equity or its equivalent," with competitors obtaining LEC financial backing, who are free from rate regulation.

Such a reading of the statute is consistent with recent Commission cases taking a broader view of ownership and control, where consistent with statutory policies. For example, in its May 1995 decision finding that Twentieth Holdings Corporation's ("THC") foreign ownership exceeded the statutory alien ownership benchmark, the Commission counted News Corp.'s capital contribution in THC as the equivalent of equity.[16] Similarly, the affiliate definition added by Section 3(a)(2) of the 1996 Act is consistent with Congressional intent because "a simple 'count the shares' methodology"[17] is not sufficient to effectuate the goal of the new effective competition test to identify significant LEC investments which have fortified competing MVPDs but which may be evidenced by instruments other than traditional common shares

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[14]H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 174 (1996) ("Conference Report").

[15]S. Rep. No. 23, 104th Cong., 2d Sess 68 (1995) (additional views of Senator Hollings).

[16]Fox Television Stations, Inc., Memorandum Opinion and Order, File No. BRCT-940201KZ, 10 FCC Rcd 8452 (1995) at ¶ 45 (footnote omitted) ("Fox 1"). The Commission affirmed these conclusions several months later, but granted a renewal of the television broadcast station at issue, WNYW-TV, due to the "unique facts" of the case. Fox Television Stations, Inc., File No. BRCT-940201KZ, 78 RR 2d 1294 (1995) ("Fox 2").

[17]Fox 1 at ¶ 43.

It is also crucial to avoid a definition of "affiliate" that is too narrow to capture the massive investments currently being made by LECs in MVPDs. A prime case study is CAI Wireless Systems, Inc. ("CAI"), which operates MMDS systems in numerous markets. In 1995, Bell Atlantic and NYNEX invested $100 million in cash in CAI. As a result, Bell Atlantic and NYNEX hold the following investment interests in CAI:

- 14% Term Notes convertible to Senior Preferred Stock at the option of Bell Atlantic and NYNEX.
- 7,000 shares of Senior Preferred Stock.
- Warrants to purchase Common Stock and Voting Preferred Stock.
- The right to convert the Term Notes, Senior Preferred Stock and Warrants, after which they would together control 45% of the fully diluted stock of CAI.

If Bell Atlantic and NYNEX fully exercised all of their purchase and conversion rights under the Warrants and the Senior Preferred Stock, their aggregate purchase price, including the consideration originally paid for the Term Notes, the Senior Preferred Stock and the Warrants, would be approximately $302 million.[18/] The 14% Term Notes, convertible to Senior Preferred Stock at the option of Bell Atlantic and NYNEX, and the Warrants to purchase Common Stock and Voting Preferred Stock, even if not qualifying as "equity" per se, certainly constitute a beneficial interest which should be deemed the "equivalent" of equity within the meaning of the "affiliate" definition adopted in the 1996 Act because CAI has immediate access to this LEC investment to expand its competitive

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[18/] See, Joint Proxy Statement-Prospectus of CAI Wireless Systems, Inc. and ACS Enterprises, Inc., August 25, 1995 ("Prospectus"); Amendment No. 2 to Schedule 13D, CAI Wireless Systems, Inc., filed with SEC October 12, 1995 ("Schedule 13D"). According to Item 5 of Schedule 13D Bell Atlantic and NYNEX also have "shared voting" rights over 45.3% of the fully diluted Common Shares of CAI. Under the Securities and Exchange Commission's rules, even if Bell Atlantic and NYNEX merely had potential voting rights, that would constitute "beneficial ownership" of 45.3% of the Common Shares of CAI. See 17 C.F.R. § 240.13d-3(d)(1)(i)(A).

activities. Indeed, given the unilateral option of Bell Atlantic/NYNEX to exercise their conversion rights and warrants, it is apparent that Bell Atlantic and NYNEX hold beneficial interests in CAI which, at a minimum, are "equivalent" to an equity interest in CAI well in excess of 10%.[19/] In fact, on the Schedule 13D filed with the Securities and Exchange Commission on October 12, 1995, Bell Atlantic and NYNEX report that their affiliates hold a collective beneficial interest in CAI equivalent to 49.4% of the CAI common shares (or 45.3% on a fully diluted basis).[20/] Accordingly, even if the above interests are not deemed to be equity, the 1996 Act's "more than 10% equity or its equivalent" test for LEC affiliation must be construed to reach substantial beneficial interests held by LECs in competing MVPDs as is the case with CAI.

In adopting the new effective competition test, Congress has determined that the ability of a competing MVPD to tap into the significant financial resources of a LEC per se renders that competitor "effective," without regard to the penetration or pass rate tests included in previous effective competition definitions.[21/] Thus, the policy of the new effective competition test differs from the policy underlying the Commission's media ownership rules, where attribution tests are designed to identify situations where one media outlet can control or influence the policies of another. Thus, from all of the foregoing, in order to fulfill Congressional goals underlying the new effective competition test, the 1996

[19/]Such conversion rights and warrants are immediately exercisable by Bell Atlantic/NYNEX, in which case Bell Atlantic/NYNEX would immediately control over 45% of the fully diluted stock of CAI. Moreover, if the planned merger between Bell Atlantic and NYNEX becomes a reality, the coordination behind the exercise of such conversion rights and warrants would presumably become much easier.

[20/]Schedule 13D at pp. 4, 6 and 10.

[21/]See Section I.B.1. of these Comments, infra.

Act's broader "equity interest or equivalent" definition should apply, whereby passive and active ownership interests would be attributable, and beneficial interests held by LECs in a MVPD would be deemed "equivalent" to an equity interest.

The Commission also asks how "beneficial interest" should be defined for the purposes of determining affiliation in connection with the new effective competition test.[22/] In order to effectuate Congressional policies properly, Time Warner recommends that the FCC adopt the definition of "beneficial ownership" promulgated by the Securities and Exchange Commission [the "SEC"] in Rule 13d-3 under the Securities Exchange Act of 1934, as amended [the "Exchange Act"], which reads, in pertinent part:

> (a) For purposes of Sections 13(d) and 13(g) of the [Exchange] Act, a beneficial owner of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares:
>
> > (1) Voting power which includes the power to vote, or to direct the voting of, such security; and/or
> >
> > (2) Investment power which includes the power to dispose, or to direct the disposition of, such security. . .
>
> (d) Notwithstanding the provisions of [paragraph] (a) . . . of this rule:
>
> > (1)(i) A person shall be deemed to be the beneficial owner of a security...if that person has the right to acquire beneficial ownership of such security, as defined in Rule 13d-3(a) within 60 days, including but not limited to any right to acquire: (A) through the exercise of any option,

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[22/]Cable Reform NPRM at ¶ 77.

> warrant or right; (B) through the conversion of a security. . . .[23/]

Section 13(d) of the Exchange Act was amended by the Williams Act, which places an affirmative disclosure duty on those persons (i) beneficially owning in excess of 5% of a public company's equity securities (by requiring such persons to file a Schedule 13D or 13G with the SEC, the company involved and the principal exchange on which its shares are traded), or (ii) commencing a "tender offer" for in excess of 5% of a public company's equity securities (by requiring such persons to file a Schedule 14D with the SEC, the company involved, the principal exchange on which its shares are traded and any competing bidder(s)).[24/] The Williams Act was enacted by Congress for the following principal reasons: (1) to protect investors from corporate raiders who could force shareholders into making a hasty, uninformed decision to sell their securities by offering to buy a portion of the target corporation's securities at a premium price;[25/] and (2) to aid investors in their decision making and maintain informed securities markets.[26/]

Thus, the SEC Rule 13d-3 affiliation test incorporates a broad sweep, in order to require disclosure of significant financial investments which may take the form of beneficial interests rather than common stock. Similarly, the new effective competition test was designed to identify situations where the competitor has been fortified through financial infusions from a LEC, even though such investments are in forms other than capital stock.

[23/]17 C.F.R. § 240.13d-3.

[24/]15 U.S.C. § 78(l)-(n).

[25/]See Susquehanna Corp. v. Pan American Sulphur Co., 423 F.2d 1075, 1085 (5th Cir. 1970).

[26/]See H.R. Rep. No. 1711, 90th Cong., 2d Sess. 2821 (1968).

Since the policy goals of the new effective competition test are analogous to the Exchange Act's policies, it would be appropriate to adopt the Exchange Act's definition of "beneficial ownership."

As is the case with the Commission's current effective competition rules, competitors should be required to cooperate reasonably in the provision of ownership affiliation information requested by the cable operator Under the current effective competition rules, cable operators may request from a competitor information regarding the competitor's reach and number of subscribers. A competitor must respond to such request within 15 days.[27/] Additionally, competitors must "supply the necessary information at their own expense, which we believe will be minimal."[28/] Moreover, the Commission may want to modify FCC Form 430 to require wireless cable licensees to certify (1) whether the licensee is LEC-affiliated and (2) whether the entity offering service over the wireless facilities is LEC-affiliated. This simple requirement could save significant resources and administrative burdens by all parties, including the Commission, who might otherwise need to undertake costly methods to investigate the wireless operator's ownership and affiliation relationships.

Also consistent with the Commission's current effective competition rules, the interests of more than one LEC should be aggregated for purposes of applying the affiliation criteria. Aggregation is necessary to encompass situations where, as in the case of CAI described above, LECs such as Bell Atlantic and NYNEX purchase equity interests (or their equivalent) in an MVPD Failure to aggregate such ownership interests could result in the anomalous situation where one LEC purchases a 10.1% equity stake in an MMDS operator

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[27/]47 C.F.R. § 76.911(b)(2).

[28/]Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, 8 FCC Rcd 5631 (1993) ("Rate Order") at ¶ 45.

and is thus considered affiliated, but six LECs could enter into a joint venture, each purchasing a 9.9% stake in the MMDS operator, for a total of 59.4%, and not be deemed affiliates of the operator. Such an anomaly would ignore the "business realities" of the situation and lead to a "patently absurd" result.[29/] The policy goal behind Sec. 301(b)(3) of the 1996 Act is to find effective competition to exist based on the unique competitive pressures which result from MVPDs with financial backing from deep-pocketed LECs. Such a result exists regardless of whether such investment is from a single LEC or an aggregated group of LECs.

2. An LEC Need Not be the Owner/Licensee of a Multichannel Video Programming Facility to Provide Effective Competition.

The Commission "tentatively conclude[s] that the new test for effective competition applies with equal force whether the LEC or its affiliate is merely the video service provider, as opposed to the licensee or owner of the facilities."[30/] Time Warner agrees that the effective competition test can be met whether the LEC or its affiliate is the owner/licensee of the facilities, the service provider over others' facilities, or both. For example, in the Albany, NY area, Capital Choice Television ("Capital") provides MMDS service in the communities served by Time Warner. Capital is owned by CAI, which, as described above,

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[29/]See Fox 1; BBC License Subsidiary, L.P., 10 FCC Rcd 7926 (1995) (Separate Statement of Commissioner Susan Ness).

[30/]Cable Reform NPRM at ¶ 71.

is affiliated with Bell Atlantic and NYNEX, both of which are LECs. The August 25, 1995 Joint Proxy Statement-Prospectus of CAI and ACS Enterprises, Inc. provides, in relevant part:

Business Relationship Agreement

> The BR Agreement is structured as an election by Bell Atlantic and NYNEX to utilize CAI's transmission systems in specified service areas in their respective operating territories in which CAI currently has an operating wireless system or wireless spectrum rights or in which CAI will have such a system or rights after the ACS Merger and the Pending Acquisitions.[31/]

Page 69 of the Prospectus lists "CAI's initial NYNEX service areas," and first on such list is Albany, New York.[32/] Page 69 goes on to state that

> [d]uring the term of the BR Agreement, with respect to any service area where the election to implement the BR Agreement has been made, Bell Atlantic or NYNEX, as the case may be, will be the provider of video services to subscribers using CAI's transmission system. CAI would become a wholesale provider of the transmission services and cease to maintain a direct subscriber relationship. Bell Atlantic or NYNEX, as appropriate, would assume all costs associated with subscriber installation and service in that market.

Accordingly, NYNEX holds the rights to be the wireless video service provider in Albany, using the facilities of CAI. It is clear in this example that NYNEX would control the facility under the Title I definition; affiliation exists based upon either ownership or control. Therefore, after meeting the other elements of the effective competition definition, NYNEX would provide effective competition to incumbent cable operators in the communities served by both competitors, regardless of whether NYNEX is the owner or licensee of the facility (although NYNEX and Bell Atlantic are clearly affiliated with Capital in this example).

[31/]Prospectus at 67 (emphasis added).

[32/]Id. at 69.

because NYNEX has the authority to control the operations of the wireless cable business in the Albany area.

B. Definition of Competition.

1. Congress Did Not Intend Any Pass or Penetration Test for Effective Competition.

The Commission properly notes that new Section 301(b)(3) of the 1996 Act "does not, unlike the other three effective competition tests, include a percentage pass or penetration rate."[33/] According to the clear language of the statute, deregulation results whenever LEC-affiliated competition is "offered" within the cable operator's franchise area, not because any minimum numbers of subscribers who are able to receive such service actually elect to do so.[34/]

Since Congress included penetration and pass requirements for the other prongs of the effective competition test only three years ago in the 1992 Cable Act, Congress was obviously familiar enough with the concept to do so here if it had so intended. It obviously did not. As Commissioner Quello stated in his separate statement to the Cable Reform NPRM, the new effective competition test is "one of the more important and straightforward provisions of the 1996 Act." Likewise, as Commission Chong stated in her Separate Statement to the Cable Reform NPRM,

> [i]n adopting an effective competition test without a specific pass or penetration rate, Congress made its intention clear that this fourth effective competition test would be met if the LEC offered service in <u>any</u> portion of the franchise area. If Congress had intended a higher standard, I believe that it would have specified a pass or penetration rate as it did in the other three

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[33/]Cable Reform NPRM at ¶ 72.

[34/]1996 Act at Sec. 301(b)(3).

> effective competition tests. Accordingly, I do not believe that we need to ask for comment on this issue.
>
> I am further troubled by the notion, expressed several times in the effective competition section of the item, that it is the Commission's role to determine when competition provided by a LEC reaches a 'sufficient' level that will have 'restraining effect on cable rates.' In my view, Congress made that determination when it adopted each of the four effective competition tests. The Commission's role is to determine whether those tests established by Congress have been met -- not to independently evaluate whether the level of competition is 'sufficient' to have 'a restraining effect on cable rates.'[35/]

Quite simply, the question of whether LEC-affiliated competition "is sufficient to have a restraining effect on cable rates" has already been decided by Congress, and the Commission is not free to revisit the issue here.

The plain language of this effective competition test also makes good sense. Clearly, Congress intended the effective competition test to reflect that an affiliation with a LEC gives an MVPD advantages over an unaffiliated competitor, such that no pass or penetration rate is necessary. Congress was undoubtedly aware of the huge capital investments, widely reported in the press, being made by LECs such as Pacific Bell, NYNEX and Bell Atlantic in MMDS operators and other MVPDs.[36/] The Commission simply should not permit cable's competitors an unwarranted opportunity to argue for restrictions on this unambiguous statutory test. Additionally, as Commissioner Quello stated,

> [t]his interpretation of the Act is consistent with both the explicit language of Section 301(b)(3), and with the underpinnings of the 1996 Act, which eliminates rate regulation on the cable

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[35/]Cable Reform NPRM, Separate Statement of Commissioner Rachelle B. Chong, at 2 (emphasis in original) (footnote omitted).

[36/]See, e.g., Rich Brown, "MMDS (Wireless Cable): A Capital Ideal," Broadcasting & Cable, May 11, 1995 at 16.

> programming services tier in three years, and in many other respects minimizes the regulatory burden on cable operators.[37]

Commissioner Quello further stated that the Commission, "in order to end the roller coaster ride of regulation that cable operators have had to endure since passage of the 1992 Cable Act," should limit its role to implementing the unambiguous words of the statute, and not read language into the new effective competition test [38]

2. Wireless Cable Should Be Rebuttably Presumed To Be Technically Available Within The 35-Mile Protected Zone.

The Cable Reform NPRM, citing the Conference Report, notes that the term "offer" will be applied as currently defined by Section 76.905(e) of the Commission's Rules.[39] In its Rate Order which adopted Section 76.905(e), the Commission stated that "[o]nce an MMDS operator has initiated operation, the service will be deemed 'offered' to those subscribers residing in the interference-free contour."[40] The Commission defines this "interference-free contour" as "a circle with a radius of 35 miles centered on the MMDS transmitter site."[41] Thus, a wireless cable system should be rebuttably presumed to technically available within its 35-mile protected zone.[42] This is a reasonable presumption,

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[37]Cable Reform NPRM, Separate Statement of Commissioner James H. Quello. The Cable Reform NPRM also recognizes that the Commission's rules to implement the 1996 Act should "achieve as quickly as possible the deregulation intended by Congress." Cable Reform NPRM at ¶ 2.

[38]Cable Reform NPRM, Separate Statement of Commissioner James H. Quello.

[39]Cable Reform NPRM at ¶ 72.

[40]Rate Order at ¶ 30 (footnote omitted)

[41]Cable Reform NPRM at ¶ 10, citing 47 C.F.R. § 21.902(d).

[42]See Memorandum Opinion and Order (Falcon Telecable, Sinton, TX), DA 95-23, 10 FCC Rcd 1654 (1995) at ¶ 9

considering that the Commission does not even accept applications for MMDS facilities within 50 miles of another station application filed before September 9, 1983.[43] Within the 35-mile protected zone, actual signal strength measurements might be used to rebut the presumption of technical availability. Similarly, beyond the 35-mile zone, a cable operator might offer signal strength measurements or other evidence that the wireless cable service is technically available to customers in communities lying outside the 35-mile zone.

3. SMATV is Not "Direct-to-Home Satellite Service."

Under the new statutory test, effective competition exists wherever a LEC or its affiliate offers video programming services directly to subscribers "by any means (other than direct-to-home satellite services)."[44] Thus, any video distribution technology will satisfy the new test, with the singular, narrow exception of "direct-to-home satellite services." Despite this unambiguous statutory language, the Commission seeks comment

> as to whether the type of service provided by, or over the facilities of, the LEC or its affiliate should be relevant. For example, we seek comment as to whether satellite master antenna television ("SMATV") systems constitute direct-to-home satellite services and hence do not fall within the class of video providers that can be a source of effective competition under the new test.[45]

The 1996 Act itself plainly indicates that SMATV is not "direct-to-home satellite service "

> [t]he term "direct-to-home satellite service" means only programming transmitted or broadcast by satellite directly to the subscribers' premises without the use of ground receiving or

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[43] See, e.g., In Re R. Gardner Partners, File Nos. 0125-CM-P-92 et al., 10 FCC Rcd 11612 (1995).

[44] 1992 Act, Sec. 301(b)(3) (emphasis added.)

[45] Cable Reform NPRM at ¶ 71 (footnote omitted)